85-2118

Supreme Court, U.S.
FILED
JUL 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

1986 TERM

ANTHONY PUGLISI, ANTHONY BODAMI AND ALBERT MORGAN,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS REGARDING THE TYPE OF FACTUAL SHOWING REQUIRED TO MEET THE MANDATES OF 18 U.S.C. §2518 (1)(c) and 2518 (3)(c).

2. THE TRIAL COURT'S REFUSAL TO PERMIT THE INTRODUCTION OF PUGLISI'S POST-ARREST STATEMENT RESULTED IN AN UNCONSTITUTIONAL LIMITATION ON HIS RIGHT TO PRESENT EXCULPATORY EVIDENCE.

3. THERE EXISTS A CLEAR CONFLICT AMONG THE CIRCUITS WHETHER THE GOVERNMENT IS REQUIRED TO PROVE ILLEGAL POSSESSION OF L-COCAINE.

4. THE COURT OF APPEALS INCORRECTLY ASSESSED THE "HARMLESS ERROR" STANDARD.

LIST OF PARTIES

THE UNITED STATES OF AMERICA,

Appellee,

vs.

ANTHONY PUGLISI, ANTHONY BODAMI AND ALBERT MORGAN,

Appellants.

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 790 F.2d 240, and is reprinted in the appendix hereto at page A-1.

A judgment of conviction was entered against petitioners Puglisi, Bodami and Morgan on August 9th, 1985, in the United States District Court for the Western District of New York after a jury trial conducted before the Hon. John T. Curtin.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Second Circuit Court of Appeals is invoked pursuant to 28 U.S.C. §1257(3).

Petitioners' convictions were affirmed by the Second Circuit Court of Appeals on May 8th, 1986. This petition was timely filed within sixty (60) days of the order affirming petitioner's convictions.

STATUTES INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S.C. §841(a)(1)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a controlled substance . . .

21 U.S.C. §843(b)

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter ii of this chapter.

21 U.S.C. §846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishible by imprisonment or fine or both . . . .

STATEMENT OF THE CASE

Petitioners were convicted of various violations of Title 21 of the United States Code on November 21st and 25th, 1985 in the United States District Court for the Western District of New York after a trial before the Hon. John T. Curtin and a jury. The defendants were convicted of separate counts of substantive crimes of possession of a controlled substance with intent to distribute and unlawful use of a communication facility used to facilitate violations of the Controlled Substance Act as well as conspiracy to possess with intent to distribute a controlled substance.

The charges as contained in the indictment as adduced at trial concerned evidence received as the result of a court ordered wiretap conducted on the telephones at petitioner Puglisi's residence and construction company. Evidence was also adduced relative to various surveillance at a Cheektowaga, New York hotel on December 3rd, 1983.

The surveillance culminated in the arrest of petitioners herein at the hotel and shortly thereafter a fourth defendant, Antonio Pavone, was arrested at his home in Jersey City, New Jersey. Subsequent to his arrest Pavone made various admissions which were sought to be introduced to the jury.

The trial of this indictment commenced on July 29th, 1985. The testimony was presented largely through and as a result of the wiretap and surveillance conducted at the hotel.

On August 9th, 1985 the jury returned verdicts convicting petitioners of each of the counts as contained in the indictment.

POINT I

THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS REGARDING THE TYPE OF FACTUAL SHOWING REQUIRED TO MEET THE MANDATES OF 18 U.S.C. §§2518(1)(c) and 2518(3)(c).

Petitioner Puglisi urged the Second Circuit Court of Appeals to reverse his convictions for conspiracy to distribute cocaine in violation of 21 U.S.C. §§841(a)(1), 846; possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(8)(1); and, six counts of utilizing a telephone facility for the commission of a felony in violation of 21 U.S.C. 8843(b) due to the illegality of the wiretapping which occurred. Specifically, Petitioner asserted that eavesdropping warrants should not have been issued because the requirements of 18 U.S.C. §§2518(1)(c) and 2518(3)(c) were not met. Without any extended analysis of the relevant principles, however, the Second Circuit affirmed the District Court's ruling observing, *inter alia*, that the trial court's decision on this issue was entitled to "deference". *See, United States v. Wilkinson*, 754 F.2d 1427 (2d Cir) *cert. den'd* ____U.S.____ , 105 S.Ct. 3482 (1985). (*United States v. Puglisi, et al.*, ____F.2d____ [sl. op. May 8, 1986, p. 3233]).

Petitioner requests this Court to grant certiorari and review the Second Circuit's Decision since not only is it clearly erroneous, but, as well, deviates significantly from the applicable standards announced by a number of the Circuit Court of Appeals. Moreover, the issue presented here is of such paramount importance and, to counsel's knowledge, has never been formally addressed by this Court. Thus, this Court's review is necessary to delineate the type of showing that must be made in an application to establish that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous". (18 U.S.C. §2518[3][c]).

It is beyond cavil that before the Government is permitted to invade the sanctity of telephone conversations, it must strictly comply with the requirements of 18 U.S.C. §2518 *et seq.* and overcome the statutory presumption against wiretapping. This can be done only by establishing an absolute necessity for the tap (*United States v. Giordano*, 416 U.S. 505, 515, 94 S.Ct. 1820, 1826 [1974]; *United States v. Ippolito*, 774 F.2d 1482, 1486 [9th Cir. 1985]; *United States v. Lilla*, 699 F.2d 99, 102-103 [2d Cir. 1983]; *United States v. Bailey*, 607 F.2d 237, 241 n. 11 [9th Cir. 1979]; *cert. den'd sub nomine Whitney v. United States*, 445 U.S. 934, 100 S.Ct. 1327 [1980]). Thus, the Federal Wiretapping Statute requires that an eavesdropping warrant issue only upon a factual showing establishing that "normal investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous". (18 U.S.C. §§2518 [1][c]; 2518 [3][c]). To meet this heavy burden, the application *must* alleqe *facts particular* to the case being investigated which render normal investigative techniques particularly ineffective (*Ippolito*, 774 F.2d at 1486; *Lilla*, 699 F.2d at 103; *United States v. Spagnuolo*, 549 F.2d 705, 710 [9th Cir. 1977]; *United States v. Kalustian*, 529 F.2d 585, 589 [9th Cir. 1975]). The purpose behind this requirement is manifest — is to insure that the highly invasive technique of electronic surveillance will not be abused. Accordingly, eavesdropping cannot be utilized as merely another convenient tool in the investigative arsenal nor where traditional investigative techniques would suffice. (*United States v. Kahn*, 415 U.S. 143, 153, n. 12, 94 S.Ct. 977, 983, n. 12 [1974]; *Lilla*, 699 F.2d at 102; *United States v. Vento*, 533 F.2d 838, 849 [3d Cir. 1976]).

The underlying rationale for such strict compliance and specificity is to prevent the Government from making general, "boilerplate" allegations about certain types of cases, and thereby sidestepping the statutory requirements. As the Court observed in *United States v. Robinson*, 698 F.2d 448 (D.C. Cir. 1983):

> "[The Court] must be careful not to permit the Government merely to characterize a case as a 'drug conspiracy' . . . that is inherently difficult to investigate. The affidavit must show with specificity why in this particular investigation ordinary means of investigation will fail." (*Id.* at 453; emphasis supplied).

It is the Second Circuit's failure, here, to require strict compliance with the statute which renders it erroneous. Indeed, as is evident by reviewing the underlying application, it is clear that the wiretaps here were sought and authorized merely as an investigatory implement, rather than an absolute necessary alternative to conventional/normal means of investigation. Thus, review ought to be granted.

The eavesdropping warrants issued here[1] were based upon the applications of Assistant United States Attorney Matthew J. Murphy, III (A-29, A-97). In support of these applications, Murphy incorporated the Affidavit of FBI Agent Michael J. King. Agent King, in an attempt to establish the prerequisites of 18 U.S.C. §2518(1)(c) delineated those circumstances which allegedly established a justifiable, compelling need for electronic surveillance. These "facts" are as follows:

1. That investigative procedures utilized to date have failed to disclose a number of facts allegedly necessary for the successful prosecution of Anthony Puglisi, Angelo D'Angelo, Dino Sciascia, Alessandro Ingroa and Angelo

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[1] There were two warrants issued. The first on November 10, 1983 and authorized intercept over the telephone located at Appellant Puglisi's residence (716-882-0169) as well as at a construction company (Tricania) owned and operated by Puglisi (716-874-5233 and 716-874-5515). This Order was supplemented by an Order dated November 29, 1983 which permitted the intercept of communications over Appellant Puglisi's residential phone (716-634-5895) located in Amherst, New York. Except for this change, however, the applications are essentially identical to each other. The change was apparently prompted by the fact that Puglisi moved within the time span that the taps were authorized (A-101).

Cammillerri, including, but not limited to, the method and means the alleged conspiracy operated and the identity of other persons involved (A-39 - A-41);

2. The claim that physical surveillance failed to disclose the "full details" of the alleged conspiracy, specifically, the actual distribution of narcotic substances and the receipt of money (A-41);

3. The *belief* that a "more aggressive surveillance" posture may well compromise the investigation by allegedly arousing the suspicions of the subjects and their confederates (A-41 - A-42);

4. The *belief* that a grand jury investigation would alert other persons who were members of the alleged conspiracy to the fact of the investigation and that if the subjects were subpoenaed, they would be unwilling to testify (A-42);

5. The *belief* that search warrants or subpoenas would be futile since the scope of the conspiracy could not be readily revealed by an examination of records and it was not known where such records were kept (A-42 - A-43);

6. The *belief* that the three confidential informants who had infiltrated the organization would not provide sufficient information for an indictment since they were not privy to all conversations of Puglisi and other members of the alleged conspiracy and they allegedly would not testify out of fear for their safety (A-43); and

7. The *belief* that it would not be feasible to introduce an undercover police officer to members of the conspiracy (*Id.*).

The stated reasons are inherently vague and unspecific. Agent King merely outlines, in conclusory fashion, investigative techniques he "believes" cannot be utilized. However, he does not set forth *facts* which indicate that these techniques would not be "feasible" or "profitable" in this particular investigation. King also assumes facts about the methods and means of the conspira-

cies alleged operation which are unsupported by any *facts* personally known to him. Moreover, he also fails to substantiate his unfounded "beliefs". Rather, under careful scrutiny, the record here plainly reveals that every investigative technique utilized was successful to the extent of acquiring information sufficient to indict a number of key members of the alleged conspiracy; that not one technique attempted proved to be unsuccessful; that a number of normal, routine avenues were *not* employed by the investigative officers; and, that there is no factual predicate for the belief that continued investigation would be too dangerous to employ.

In totality, as indicated in the application, *at least three* reliable, confidential informants had infiltrated the very core of the narcotics distribution activities of Petitioner and had been able to provide significant amounts of intelligence regarding the operation of the conspiracy, its membership *and*, most importantly, its connection with co-defendant Anthony Pavone in New York City (A-48; A-66). While these informants were purportedly reluctant to testify (A-43),[2] there is absolutely no indication that Agent King was fearful of their discovery. Moreover, due to the close relationship each of these persons had with a number of people who were allegedly members of the conspiracy, the Government could have easily taken the step of equipping one or more of the informants with "body mikes" by which the FBI could monitor conversations occurring in their presence. Yet, this rudimentary step was never taken.

However, despite the substantial progress made, Agent King nevertheless reached the conclusion that further "normal" investigation would not be viable based upon a number of unfounded and unsubstantiated "beliefs", hunches and speculations. In es-

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[2] Other than King's conclusory statement, however, there is no indication that the informants advised him that they would refuse to testify even if granted immunity and promised to be placed in the Federal Witness Protection Program.

sence, King claimed that it was "tough" to crack a drug conspiracy. Thus, wiretapping was somehow mandated. Such conclusory allegations, however, have *never* been accepted as sufficient by any court prior to the Second Circuit's decision in this case. *See, Robinson, supra; United States v. Spagnuolo,* 549 F.2d 705 (9th Cir. 1977); *United States v. DiMuro,* 540 F.2d 503 (1st Cir. 1976) *cert. den'd* 429 U.S. 1038 (1977); *United States v. Torres,* 583 F.Supp. 86, 96 (N.D. Il. 1984) *reversed and remanded on other grounds* 751 F.2d 875 (7th Cir.) *cert. den'd,* ____U.S.____ , 105 S.Ct. 1853 (1985). Thus, this Court is required to examine this case to insure not only that the strict comments of the statute are met, but also to protect the integrity of this Court's decision in *Berger v. New York,* 388 U.S. 41, 87 S.Ct. 1873 (1967).

It is also submitted that the Second Circuit's decision in this case is in error and is contrary to the approach utilized in other circuits. For example, in *United States v. Ippolito, supra,* the Ninth Circuit rejected the Government's assertion that normal investigative techniques would not be successful due to the fact, *inter alia,* that the confidential informants who had infiltrated the drug conspiracy were fearful of testifying because the suspects were all allegedly members of the La Casa Nostra and the informants were not allegedly familiar with all aspects of the criminal enterprise (774 F.2d at 1483-1484). Moreover, it was apparent that the informants were intimately familiar with a number of participants in the conspiracy and had accompanied them to drug transactions (much like the situation here). The Ninth Circuit observed that:

> "The Government has tried certain alternatives, *but has failed to pursue others that easily suggest themselves and are potentially productive and not unduly dangerous.* Certainly, one of the options of the issuing judge would have been to deny the application because *necessity* was *not* shown.
>
> Further, although the Government need not pursue every alternative means of investigation, neither *should it be able*

> *to ignore avenues of investigation that appear both fruitful and cost-effective. It is not unreasonable to expect the Government to ulitize those methods that appear to be productive. We would flout the statutory intent that wiretaps be used only if necessary, were we to sanction a wiretap simply because the Government pursued some "normal" investigative strategies that were unproductive, when more fruitful investigative methods were available.* In effect, the Government would be able to secure a wiretap in every case, even where a normal strategy would be likely to achieve the same result without resort to this serious intrusion that a wiretap necessary entails." (774 F.2d at 1486; emphasis supplied).

Here, the Government also failed to pursue other potentially productive and safe investigative techniques, such as the installation of beepers on the suspects' cars (*See, United States v. Knotts*, 460 U.S. 276 [1980]); the utilization of body mikes/transmitters on one or more informants; the utilization of the informants, either alone or in conjunction with each other, to attempt to introduce undercover agents to members of the conspiracy; the surveillance of meetings which occur in public places by the utilization of available technology (*See, United States v. Lace*, 669 F.2d 46 [2d Cor. 1982], *cert. den'd*, 459 U.S. 854, 103 S.Ct. 121); and, at least attempting to utilize the informants to arrange a drug transaction, either over the telephone or in person. The application, however, fails to adequately explain why such common methods were not employed or were deemed too dangerous. Yet, despite this fact, the Second Circuit gave short shrift to Petitioner's arguments as well as the interpretation of this requirement by the Ninth Circuit. Indeed, the Second Circuit's decision here is in conflict with its own decisions in this field.

For example, in *United States v. Fury*, 554 F.2d 522, (2d Cir.) *cert. den'd* 433 U.S. 910, 97 S.Ct. 2978 (1977), surveillance of various automobiles was attempted on numerous occasions, but was thwarted because of the suspect's suspicions and their consequent changing of routes. Further, the defendant frequently

checked with a past bugging location, leading the police to conclude that he was unusually sensitive to surveillance. Thus, it was clear that "normal" surveillance would be futile.

In *United States v. Martino*, 664 F.2d 860 (2d Cir. 1981) *cert. den'd* 458 U.S. 1110, 102 S.Ct. 3493 (1982), undercover agents made repeated attempts to secure entrance into the defendant's narcotics ring. However, they were continuously rebuffed by the wary suspects, thereby justifying the need for electronic surveillance. No such justification is apparent, however, from the facts of the present case.

The Second Circuit's decision here is also in contrast to *United States v. Kalustian, supra.* The investigating agents in *Kalustian* received information from a reliable informant that Kalustian was operating a gambling enterprise from a certain night club. The informant had also identified other persons who were members of the operation and their respective roles. In attempting to establish that normal investigative techniques were unavailing, the application delineated a number of factors which attempted to meet the requirements of 18 U.S.C §§2418(1) and 2518(3)(c). Rejecting these assertions, and ordering suppression, the Ninth Circuit observed that the sole basis for disgarding the alternative means of investigation was due to:

> "Knowledge and experience" in investigating other gambling cases . . . The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguished in nature or degree from any other gambling case. *In effect, the Government's position is that all gamblinq conspiracies are tough to crack, so the Government need show only the probability that illeqal gambling is afoot to justify electronic surveillance." Title III does not support that view.*
>
> * * *
>
> Obviously, electronic surveillance can facilitate criminal investigation. Because other investigative techniques are usu-

> ally slower and more difficult, Congress did not require exhaustion of "all possible" investigative techniques before orders for wiretaps could be issued. [citation omitted]. But, Title III does not allow wiretapping to replace such other techniques unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." (529 F.2d at 589-590, emphasis supplied).

In light of the foregoing, it is clear that the Second Circuit's reluctance to undergo a serious analysis of the issues posed here, coupled with the disharmony created by the decision in this case and the Ninth Circuit's decision in *Kalustian* and *Ippolito*, *supra*, require that this Court grant a writ of *certiorari* to insure that the statute's clear terms are not easily circumvented.

POINT II

THE TRIAL COURT'S REFUSAL TO PERMIT THE INTRODUCTION OF PUGLISI'S POST-ARREST STATEMENT RESULTED IN AN UNCONSTITUTIONAL LIMITATION ON HIS RIGHT TO PRESENT EXCULPATORY EVIDENCE.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi*, 14 U.S. 284, 302 [1972]). Not only is this right specifically guaranteed by the Sixth Amendment, it is also recognized as among the minimal essentials of a fair trial and is an important element of a defendant's fundamental Fifth Amendment right to due process (*Id.* at 294).

In this case, the ability of Petitioner to present exculpatory evidence was severely infringed by the trial court's refusal to permit the introduction of a post-arrest statements. Without undergoing any thorough analysis, or even considering the arguments raised by the Petitioner, the Second Circuit observed that these state-

ments were inadmissible without seriously considering whether or not the "residual exception" (F.R.E. 803[24]) applied to this case. Thus, corrective action is mandated by this Court.

The facts which are underlying this issue are not complicated and can be briefly stated. Immediately after his arrest, Petitioner was transported to FBI headquarters in Buffalo, New York, advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966); executed a written waiver of these rights; and, engaged in a three and one-half hour conversation with the investigative agents (V-155 - 156).

At trial, Petitioner's attorney moved to introduce the contents of this post-arrest statement. When the trial court questioned counsel regarding the trustworthines of the statement and its contents, counsel responded that it was offered under the "residual exception" to demonstrate that:

1. Puglisi had received $20,000 from Bodami;
2. That Puglisi had a working relationship in the construction trade; and
3. The money represented work-related payments from Bodami.

When the court inquired of the Government regarding its position on the proffer, the Government conceded that it was virtually undeniable that Bodami and Puglisi had a legitimate business relationship (V-32). The Government further conceded that the "trustworthiness" of the statement "is not an issue. The question is, is it hearsay?" (V-39). Despite this concession, however, the Court sustained the Government's objection to the admissibility and instructed the jury that it would not allow Puglisi's statements to be introduced "under the Rules of Evidence" (V-49).

It is Petitioner's contention that this ruling constituted clear error and Second Circuit's refusal even to consider the admissibility

under the "residual" exception requires corrective action by this Court.

Generally, when a defendant seeks to introduce his own prior statements merely for the truth of the matter asserted, they are hearsay and inadmissible (*United States v. Marin*, 669 F.2d 73, 84 [2d Cir. 1982]). Under certain circumstances, however, an offer of defendant's statement to show that it was made, rather than to establish the truth, should be permitted, since this is relevant and material information. *Marin, Id.* at 84. Indeed, the circumstances of this case, the introduction of such a statement is not only relevant, but crucial to establish lack of knowledge on petitioner's part.

The Second Circuit, however, despite its prior decision in *United States v. Morales*, 577 F.2d 679, 772 (2d Cir. 1978) and *United States v. Lawal*, 736 F.2d 5 (2d Cir. 1984), which recognized that a decision to cooperate with Government agents immediately upon apprehension can be utilized as circumstantial indicia of his "state of mind", thus, negating any presumption of guilty knowledge arising from defendant's possession of the fruits of the crime, refused to overturn the trial court's ruling.

The Second Circuit also failed to adequately explore the statements admissibility under F.R.E. 803(3) (the "state of mind" exception) again, without any analysis. This is primarily egregious in this case since the elements of the charged offenses included, as an essential element, knowledge that he possessed controlled substances. The trial court's refusal to permit petitioner's post-arrest statement constituted egregious error. In light of the Government's objection of it, and the natural inference of recent unexplained possession of the alleged fruits of a crime. Indeed, the Second Circuit's opinion is directly contrary to its prior decisions in *United States v. Harris*, 733 F.2d 994 (2d Cir. 1984) and *United States v. DiMaria*, 727 F.2d 265 (2d Cir. 1984). This contrary

results within the Second Circuit, then, require this Court to exercise its *certiorari* power.

Petitioner also asserted below that the statement was admissible as a "verbal act" and, thus, not "hearsay" as defined by F.R.E. 801. Generally, the verbal act doctrine applies when "the utterance is an operative fact which gives rise to legal consequences". 4 Weinstein's Evidence §801 (c)[01], at 801-65 (1981). (*See*, also, *DiMaria*, 727 F.2d at 270 n.4.

Further, the "doctrine of completeness", reflected in F.R.E. 106 required the trial court to admit the content of the entire conversation so that the jury can intelligently decide the factual issue as to the reliability of the agent's voice identifications. Thus, where the adverse party feels that the statement should be admitted to place it in context, avoid misleading the trier of fact or to insure a "fair and impartial understanding of the statement, it is error not to accept it. *United States v. Rubin*, 609 F.2d 51, 63 (2d Cir. 1979) *aff'd*. 449 U.S. 424 (1981); *United States v. Jamar*, 561 F.2d 1103 (2d Cir. 1977); *United States v. Capaldo*, 402 E.2d 821, 824 (2d Cir. 1968), *cert. den'd* 394 U.S. 989 (1969).

For these reasons and authorities, the cumulative effect of the trial court's refusal to permit the introduction of the post-arrest statements, and the Second Circuit's reluctance to undergo any careful scrutiny regarding its admissibility, deprived the Petitioner of presenting relevant, material and exculpatory proof, thus infringing upon his fundamental Constitutional rights. As a result, this Court ought to grant the writ of *certiorari* in order to direct attention to this constitutional problem.

POINT III

THERE EXISTS A CLEAR CONFLICT AMONG THE CIRCUITS WHETHER THE GOVERNMENT IS REQUIRED TO PROVE ILLEGAL POSSESSION OF L-COCAINE.

The defendants assert that the Government failed to prove that the substance was a controlled substance as defined by Schedule II (A)(4), 21 U.S.C. §812(c). Schedule II defines a controlled substance to include:

> "Cocoa leaves, and any salt compound, derivative or preparation of cocoa leaves, and any salt, compound, derivative or preparation which is chemically equivalent or identical with any of those substances."

No matter how persuasive the guilt may seem to the Court, a defendant does not carry the burden of disputing it, nor does his failure to offer evidence on any element of the crime change or satisfy the prosecutor's burden. *Lopez For and In Behalf of Garcia v. Curry*, 583 F.2d 1188 (2d Cir. 1978). Defense counsel clearly "is under no compulsion to bring out facts or data except those unfavorable to the opinion" of an expert witness (Federal Rule of Evidence, Section 705, Notes to the Advisory Committee on Proposed Rules).

There existed at the time this crime occurred a clear and definite conflict among the United States Circuit Courts concerning this issue.

The Court wrote in *United States v. Hall*, 525 F.2d 1254 (5th Cir. 1976) that:

> "Defendant's plea of not guilty leaves the Government with the burden of proving each essential element which here included a demonstration that the seized substance was the illegal form of cocaine."

In *United States v. Ross*, 719 F.2d 615 (2d Cir. 1983), the Court determined that the burden is on the Government to prove at trial that the cocaine substance possessed is either L-cocaine or chemically equivalent or identical to L-cocaine. It has been determined that cocaine has eight isomers, only one of which — L-cocaine — is a derivative of the cocoa leaf. Since the other seven isomers are synthetic, they are "controlled" by the statute only if they are "chemically equivalent or identical with" L-cocaine. This rationale was developed and followed in other Circuit Courts. *United States v. Ortiz*, 610 F.2d 280 (5th Cir. 1980) *cert. den'd*, 445 U.S. 930 (1980); *United States v. Luschen*, 614 F.2d 1164 (8th Cir.) *cert. den'd* 446 U.S. 939 (1980); *United States v. Hall*, 552 F.2d 273 (9th Cir. 1977); *United States v. Wilburn*, 549 F.2d 734 (10th Cir. 1977); *United States v. Umentum*, 547 F.2d 987 (7th Cir. 1976) *cert. den'd* 430 U.S. 983 (1977); *United States v. Orzechowski*, 547 F.2d 978 (7th Cir.) *cert. den'd* 431 U.S. 906 (1977).

While the so-called cocaine isomer defense had been successfully adopted in many Circuit Courts, other have refused to follow its precedent. Thus, in *United States v. Francesco*, 725 F.2d 817 (1st Cir. 1984):

> "The defense in this case made no attempt to demonstrate that the term could denote some uncommon substance that is not a controlled substance under the Act. The defense did not cross examine the Government experts and presented no experttestimony of its own on the chemical composition of the substances seized from the defendant or on the various allegedly legal cocaine isomers. Although the Government has the burden in a criminal case of proving every element of the offense charged, it has no burden of proving that a term used in its commonly understood sense has no other possible meaning — at least until the possibility is raised by the defense."

Further the Congress has realized the problems in the statute and has amended the wording in Title 21, Schedule II to include

"cocaine and ecgonine and their . . . isomers", 21 U.S.C. §812(e), Schedule II(A)(4), Supp. II, 1984. These amendments were intended to render the "isomer defense" ineffective. *See, United States v. Puglisi*, n.1. A decision by this Court in favor of the defendants would have limited impact in light of these amendments made to the statute effective October 12, 1984.

Finally, the lower court inaccurately relies on *United States v. Carr*, 582 F.2d 242, 244-246 (2d Cir. 1978), in that the Court in that matter stated further at page 246:

> "We conclude, therefore, that lack of authorization is not an element of section 1014. Thus, the Government was under no initial obligation to produce proof on this point."

POINT IV

THE COURT OF APPEALS INCORRECTLY ASSESSED THE "HARMLESS ERRIE" STANDARD

Petitioners claimed that the District Court erred in its refusal to permit defendant Bodami to introduce an unredacted statement of an unavailable co-defendant whose statement exculpated Bodami. The Government claimed in the lower court that introduction of the statement would violate defendant Puglisi's rights as guaranteed under *Bruton v. United States*, 391 U.S. 123 (1968) and Fed.R.Evid. 803(24) and 804(b)(5).

The Second Circuit Court of Appeals found the Government's argument unavailing. Holding that the Government cannot insist on a multi-defendant trial and then argue for the exclusion of testimony the testimony should have been permitted. However, the Court found that the error was harmless in light of evidence that Bodami and Puglisi spent "the entire evening together" and "the wiretap evidence reflected several calls in which Bodami and Puglisi made plans for the night in question."

In *Chapman v. California*, 386 U.S. 18 (1967) this Court wrote, in assessing when an error may be found to be harmless, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was *harmless beyond a reasonable doubt.*" (at p.24; emphasis added).

The record below clearly indicates that the statement was both reliable and trustworthy. Additionally, the Court found that the statement was relevant inasmuch as it showed Bodami's lack of involvement in the drug transactions which later took place in the hotel. (Fed.R.Evid. 804(b)(5) and 803 (24)).

The statement by Pavone indicated that he was a friend of Anthony Puglisi from Buffalo, New York and that Pavone had requested Puglisi to seek out a third individual (not Bodami) to insure that Pavone's delivery would be secure. Pavone was to meet Puglisi and his drug courier in Buffalo where Puglisi would facilitate the transaction of the currency. Bodami was not mentioned to have any role.

The wiretaps and surveillance corroborated Pavone's statement. Clearly his mere propinquity to others separately suspected was not the type of proof which would have rendered the trial court's refusal to permit the statement "harmless beyond a reasonable doubt." Rather, the statement would have proven that Bodami had no role in the transactions.

Notably, the surveillance did not put Bodami in the presence of Puglisi for "the entire evening" as the Court of Appeals found. Rather, Bodami was observed alone in the bar area for much of the evening. None of the observed conduct would have by itself indicated criminality.

The Court of Appeals also erred in holding that the trial Court's refusal to charge that a purchaser of drugs could not be convicted of aiding or abetting the sale. Finding that the Court's refusal

constituted "harmless error" it held that "the machinations of Puglisi and Bodami as reflected by the wiretap evidence, combined with the fact that it was Morgan rather than they who received the drugs, amply supported the aiding and abetting conviction." Clearly, the mere fact that Morgan ultimately took possession of the drugs has little to do with the issue of the trial Court's refusal to charge.

Generally, most courts will consider whether the other testimony was so "overwhelming" as to render the disallowed testimony harmless. In the instant case the Pavone statement clearly showed that Bodami had no role in the drug transactions and served to explain his presence at the hotel that evening. (*United States v. Shakleford*, 738 F2d 776, 783-84 (7th Cir. 1984).

Inasmuch as the Court of Appeals failed to follow the appropriate test for a determination of harmless error this Court is requested to grant certiorari in order to direct attention to the error committed below.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1044, 1050, 1054, 1051—August Term, 1985

(Argued March 31, 1986 Decided May 8, 1986)

Docket Nos. 85-1439, -1440, -1441, 86-1032

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY PUGLISI, ANTHONY BODAMI, ALBERT MORGAN, and ANTONIO PAVONE,

Appellants.

Before:

OAKES, NEWMAN, and WINTER,

Circuit Judges.

Appeal from convictions of violations of narcotics laws after a jury trial in the United States District Court for the Western District of New York, John T. Curtin, *Chief*

Judge. Arguments re wiretap surveillance, cocaine isomer defense, post-arrest statements, *Bruton* claim, aiding and abetting proof, and lack of consent to search rejected.

PAUL J. CAMBRIA, JR., Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, NY, *for Appellant Puglisi*.

HERBERT L. GREENMAN, Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, NY, *for Appellant Bodami*.

JOHN J. MOLLOY, West Seneca, NY, *for Appellant Morgan*.

ROBERT BLOSSNER, New York, NY, *for Appellant Pavone*.

FRANK J. CLARK III, Assistant United States Attorney (Salvatore R. Martoche, United States Attorney for the Western District of New York, of counsel), *for Appellee*.

PER CURIAM:

After a jury trial before Chief Judge John T. Curtin in the United States District Court for the Western District of New York, appellants Anthony Puglisi, Anthony Bodami, and Albert Morgan were convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982), and of possessing cocaine with

intent to distribute it in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (1982). Additionally, Puglisi was convicted of six counts, and Bodami of three counts, of using a telephone to facilitate commission of a felony in violation of 21 U.S.C. § 843(b) (1982). All three co-defendants appeal. A fourth co-defendant, Antonio Pavone, pleaded guilty to a charge of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 (1982), but reserved his right to appeal from the district court's orders denying suppression of intercepted wire communications and evidence seized from his apartment. We affirm all four convictions.

Appellants first argue that eavesdropping warrants should not have issued here because the requirements of 18 U.S.C. §§ 2518(1)(c) and 2518(3)(c) (1982)—that the application for a warrant reflect, and the issuing judge determine, that other, normal "investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. § 2518(3)(c)—were not met here. We disagree. The district court, which is entitled to deference, *United States v. Wilkinson*, 754 F.2d 1427, 1433 (2d Cir.), *cert. denied*, 105 S. Ct. 3482 (1985), refused to suppress the wiretap evidence, finding that other procedures either were tried and shown to be unfruitful or were impractical. This finding was based on an affidavit submitted in support of a wiretap authorization application claiming that visual surveillance had been unsuccessful, that confidential informants were unable adequately to penetrate the conspiracy and were in any event unwilling to testify, and that an undercover officer would be unable to infiltrate the conspiracy because of the close-knit nature of the group and its strong ethnic ties. Surveillance had

taken place for over six months, pen registers had been used for over five months, and three informants had provided data to the FBI over a period of two years. This stands in stark contrast to *United States v. Lilla*, 699 F.2d 99, 104-05 (2d Cir. 1983), where, less than a month after being informed that Lilla was selling narcotics, and after buying marijuana directly from Lilla, a state trooper obtained an eavesdropping warrant solely on the strength of his representations that no other investigative method would reveal Lilla's co-conspirators.

Appellants next claim that the Government failed to prove every element of the crime charged because it did not prove that the cocaine involved in this case was, or was chemically equivalent or identical to, L-cocaine, the cocaine isomer derived from the coca leaf and therefore the only isomer that was a controlled substance as defined in Schedule II(a)(4), 21 U.S.C. § 812(c) (1982), before its amendment in 1984.[1] *See United States v. Ross*, 719 F.2d 615, 617-18 (2d Cir. 1983). Appellants argue that *Ross* requires reversal. We disagree. *Ross* held only that where the cross-examination of the Government's chemist revealed his serious confusion and questionable credibility regarding whether the seized cocaine had been L-cocaine or D-cocaine, the court erred in instructing the jury that D-cocaine was equivalent to L-cocaine because it allowed

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1. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, §§ 507(a), (c), 98 Stat. 1976, 2071, amended Title 21 to include in Schedule II "cocaine and ecgonine and their . . . isomers," 21 U.S.C. § 812(c), Schedule II(a)(4) (Supp. II 1984), and to define "isomer" for the purpose of this section as "the optical or geometric isomer." 21 U.S.C. § 802(14) (Supp. II 1984). These amendments were intended to render the "isomer defense" ineffective. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 263, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3445. However, the activity giving rise to this case took place on December 2, 1983, and we must therefore consider the statute as it stood before its amendment on October 12, 1984.

the jury to convict even if it found the defendants had possessed D-cocaine. *Id.* at 618. By contrast, in this case, appellants never raised an issue regarding which cocaine isomer was seized. The circumstances here are virtually identical to those in *United States v. Francesco*, 725 F.2d 817 (1st Cir. 1984) (upholding conviction for possession of narcotics where the substances were referred to only as "cocaine" and "cocaine hydrochloride" and there was no testimony regarding isomers). There, the court stated, "Although the government has the burden . . . of proving every element of the offense charged, it has no burden of proving that a term used in its commonly understood sense has no other possible meaning—at least until the possibility of another meaning is raised by the defense." *Id.* at 821. Because no issue was raised as to which isomer of cocaine was involved here, the Government was not required to offer evidence on the matter. *Cf. United States v. Carr*, 582 F.2d 242, 244-46 (2d Cir. 1978) (Government not required to prove lack of authorization to make loan application in false name).

Appellants Puglisi and Bodami claim that the district court erred in refusing to admit their post-arrest statements. Both, however, were properly excluded as hearsay. That the statements may have indicated an intent to cooperate with law enforcement personnel does not bring them within the "state of mind" exception of Fed. R. Evid. 803(3), since the statements themselves do not reveal a state of mind.

Appellant Bodami claims the district court erred in refusing to admit in its entirety Pavone's post-arrest statement in which Pavone incriminated Puglisi but did not mention Bodami. Bodami claimed the statement was exculpatory as to him and that the refusal to admit it

because it would inculpate his co-defendant was improper. The Government's contentions—that since Bodami does not seek review of the denial of his motion to sever his trial from Puglisi's, he cannot complain of any exclusions thereafter required under *Bruton v. United States*, 391 U.S. 123 (1968), and that under Fed. R. Evid. 803(24) and 804(b)(5), the interests of justice would not have been served by admitting the statement because it would prejudice Puglisi—are unconvincing and, indeed, inappropriate. The Government can hardly insist on multi-defendant trials and then claim that the interests of justice require the exclusion of evidence inculpatory as to one defendant even if it helps another. Nor can it assert persuasively that failure to challenge on appeal denial of a severance motion means a defendant loses his basis to challenge the exclusion of evidence introduced after the refusal to sever. However, in this case, we think that if error occurred, it was harmless. There was ample evidence that Bodami and Puglisi spent the entire evening together and the wiretap evidence reflected several calls in which Bodami and Puglisi made plans for the night in question.

Appellants next claim that the court erred in failing to charge that an individual who merely purchases drugs cannot be convicted of aiding or abetting the sale. If there was an error in this respect, it was also harmless. The machinations of Puglisi and Bodami, as reflected by the wiretap evidence, combined with the fact that it was Morgan rather than they who received the drugs, amply supported the aiding and abetting conviction.

Appellant Pavone claims that the search of his apartment was invalid because the Government failed to prove that Pavone's consent to the search was voluntary as

required by *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Under *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), "whether a consent to a search was in fact 'voluntary' . . . is a question of fact to be determined from the totality of all the circumstances." *See also United States v. Wiener*, 534 F.2d 15, 17 (2d Cir.) (district court's factual finding of consent will not be set aside unless clearly erroneous), *cert. denied*, 429 U.S. 820 (1976). In this case, Pavone was apparently walking out of his apartment when he was apprehended by FBI agents waiting in the hallway with weapons drawn. He was frisked, handcuffed, and informed he was being arrested for narcotics violations. He was then brought back into his apartment and advised of his constitutional rights. The agents determined that they needed a warrant to search the apartment. They then asked Pavone if he was willing to allow the agents to search the apartment. He said he had no objection. The agents drafted a consent form, and additionally located a preprinted consent form, both of which Pavone signed, even after he was informed by one of the agents that he did not have to consent to a search. The agents then executed the search.

Notwithstanding protests to the contrary, *see, e.g.*, *United States v. Watson*, 423 U.S. 411, 456-58 (1976) (Marshall, J., dissenting), the fact that a defendant is in custody does not alone vitiate his consent to a search. *See Watson*, 423 U.S. at 424-25. True, consent to search obtained from a person in custody does "require more careful scrutiny." *Wiener*, 534 F.2d at 17. In addition to those considerations *Schneckloth*, 412 U.S. at 226, listed as among those pertinent to the voluntariness question—age, education, intelligence, length of detention, use of physical punishments or deprivations, and whether the

alleged consenting person was advised of his constitutional rights—this circuit has found, in cases where consent is obtained from a person in custody, that whether guns were drawn or the consenting individual was frisked, *United States v. Vasquez*, 638 F.2d 507, 524 (2d Cir. 1980), *cert. denied*, 454 U.S. 847 (1981), or whether the consenting individual was threatened, was in a public area, or was informed that he had the option of refusing consent to the search, *United States v. Vasquez-Santiago*, 602 F.2d 1069, 1073 (2d Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), are simply relevant factors in determining the voluntariness of the consent. In this case, while the appellant was advised of his *Miranda* rights and advised that he did not have to consent to a search, he was in handcuffs, had been arrested by agents with weapons drawn, and had been frisked. The district court made no factual findings with reference to Pavone's age, intelligence, or experience with law enforcement, noting only that, "[t]hough he may have had some difficulty with written English, the agents also advised him of his rights orally, and he understood them." Nonetheless, in light of the district court's ability to judge the credibility of the agent who obtained the consent, we cannot find the judge's conclusion that Pavone voluntarily consented to the search clearly erroneous.

We have considered the parties' other contentions and find them unavailing.

Judgment affirmed.

WDNY
CR 83-189
CURTIN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

FILED MAY 29, 1986, United States Court of Appeals, Second Circuit.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of May one thousand nine hundred and eighty-six.

Present: HON. JAMES L. OAKES, HON. JON O. NEWMAN, HON. RALPH K. WINTER, Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY PUGLISI,
ANTHONY BODAMI,
ALBERT MORGAN and
ANTONIO PAVONE,

Appellants.

Docket Nos. 85-1439
85-1440
85-1441
86-1032

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk
/s/ By: Edward J. Guardaro
Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk
/s/ By: Marcia D. Mahar
Deputy Clerk
(Seal)